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In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 713

THE UNITED STATES, PETITIONER

v.

THE SUNSWICK CORPORATION, A CORPORATION OF DELAWARE

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the Court of Claims, entered in the above-entitled case on January 5, 1948.

OPINION BELOW

The opinion of the Court of Claims (R. 22–36) has not yet been reported.

JURISDICTION

The judgment of the Court of Claims was entered on January 5, 1948 (R. 36). The jurisdiction of this Court is invoked under the provisions of Section 3 (b) of the Act of February 13, 1925, as amended.

QUESTION PRESENTED

Whether a specific directive issued by an agency of the National War Labor Board under Executive Order No. 9250 ("Providing for the Stabilizing of the National Economy"), increasing the wage rates provided in respondent's construction contract with the Government, constituted an interference with respondent's performance for which the United States should be held liable.

EXECUTIVE ORDER AND CONTRACT PROVISIONS INVOLVED

The contract provisions involved are set forth in Appendix A, *infra,* pp. 20–22. Pertinent portions of Executive Order No. 9250 and War Labor Board General Order No. 13 are set forth in Appendix B, *infra,* pp. 23–30.

STATEMENT

On September 21, 1944, respondent entered into a contract with the United States (acting through the Corps of Engineers of the War Department) to perform certain construction work on the South Canal at St. Mary's Falls Canal, Sault Ste. Marie, Michigan. The contract was of the lump-sum type, establishing stated unit prices which totaled, in estimate, $954,452.24 (R. 12–13). Article 17, entitled "Rate of wages," required respondent to "pay all mechanics and laborers employed directly upon the site of the work

* * * the full amounts accrued at time of payment, computed at wage rates not less or more than those stated in the specifications (subject to Executive Order Number 9250 and the General Orders and Regulations issued thereunder) * * *" (R. 4–5, 13–14). The pertinent specification provided that the Secretary of Labor had determined, as of March 11, 1944, that the prevailing rate of wages for "Carpenters, journeymen" was $1.25 per hour,[1] and that these wages "shall be the maximum wages to be paid, subject, however, to Executive Order No. 9250 and the General Orders and Regulations issued thereunder" (R. 5, 14–15). The contract also contained the standard "Changes" (Article 3) and "Disputes" (Article 15) provisions (R. 3–4, 13).

Before bidding, respondent secured a copy of the specifications and relied thereon in the preparation of its bid. Likewise before submission of the bid, respondent's assistant Vice-President

[1] The same section of the specifications (Section 1–21) provided that any other "class of laborers and mechanics * * * shall be classified or reclassified conformably to the foregoing schedule [*i. e.*, the schedule listing "Carpenters, journeymen"] by mutual agreement between the Contractor and class of labor concerned subject to the prior approval of the Division Engineer, G. L. D. [*i. e.*, Great Lakes Division], Chicago, Illinois. In the event the interested parties cannot agree on the proper classification or reclassification of a particular class of laborers and mechanics to be used, the question, accompanied by the recommendation of the Division Engineer, shall be referred to the Secretary of Labor for final determination" (R. 15).

spent several days at Sault Ste. Marie, investigating the labor situation there, and he found that the prevailing rate for carpenters was $1.25 per hour, as the specifications provided, and that an adequate supply of carpenters could be obtained at that rate. Respondent's representative did not, however, call at the office of the local carpenters' union, nor did he discuss the question of carpenters' wage rates with the union officials. In preparing its bid, respondent relied on the specifications' wage provisions, and made no allowance for an increase in wage rates. (R. 16–17.)

Work under the contract began on the day it was signed, September 21, 1944. During the ensuing two weeks, respondent had no difficulty in obtaining, through the local union, a sufficient number of carpenters at the wage rate of $1.25 per hour (R. 17). On October 6, 1944, however, a local union representative demanded that respondent pay those carpenters who were employed on work, which the union construed as "waterfront work," at the rate of $1.425 per hour. The union based its claim on an agreement it had made, on January 1, 1944, with two local contractors, neither of whom performed any waterfront construction work (R. 17). This agreement, of which respondent had no previous knowledge (R. 17), provided that the minimum wage rate for carpenters doing "waterfront work" (as defined in detail) would be $1.425 per hour (R. 17). Re-

spondent refused to accede to the union's demand because it did not believe that its carpenters were doing "waterfront work," as defined by the local agreement, and also because of the wage rate provisions of Article 17 of its contract with the United States[2] (R. 17). Finding themselves unable to settle the controversy, even with the aid of a Conciliation Commissioner from the Labor Department, respondent and the union agreed in writing, on October 25, 1944, to submit the dispute, "in accordance with E. O. No. 9017, dated January 12, 1942 and the War Labor Disputes Act," to the National War Labor Board, or its agent, which was to "make a final disposition of the issues in the case by directive order" (R. 17–18).

The jurisdiction of the National War Labor Board over this type of controversy (in October 1944) formed part of the wartime system which had developed for the peaceful settlement of wage disputes in accordance with the national anti-inflation program. On May 22, 1942, the Building and Construction Trades Department of the American Federation of Labor entered into an agreement with the agencies of the Federal Gov-

[2] Respondent learned somewhat later that the Great Lakes Dock and Dredge Co., the only other contractor engaged in waterfront construction work in that area, had orally agreed to pay and was paying its carpenters $1.425 per hour for waterfront work, although the work was being performed under a government contract which contained the same wage rate specifications as respondent's contract (R. 17).

ernment in charge of building and construction work essential to the successful prosecution of the war, which provided that in all government-financed war construction work, "the wage rates paid under collective bargaining agreements as of July 1, 1942 shall remain in full force and effect for a period of at least one year after that date and, subject to annual renewal of this agreement for the duration of the war"; the July 1, 1942, wage rates were to be subject to revision where they were inadequate because of certain circumstances, and a Wage Adjustment Board was to be created to determine whether any such wage adjustment should be made and to fix the amount (R. 15). In accordance with this agreement, and pursuant to Presidential direction, the Secretary of Labor, on May 29, 1942, issued Administrative Order No. 101 establishing a Wage Adjustment Board with "power to investigate and to recommend an adjustment of wage rates under the above agreement of the labor organizations in the building construction industry." The same order announced that the Secretary of Labor, in determining the prevailing rates of wages under the Davis-Bacon Act (Act of March 3, 1931, 46 Stat. 1494, as amended by the Act of August 30, 1935, 49 Stat. 1011, 40 U. S. C. 276a), would, "unless compelling evidence to the contrary be presented, accept as prevailing those wage rates which were prevailing on July 1, 1942," unless adjusted by a recommendation of the newly-created Wage Ad-

justment Board. 7 Fed. Reg. 5893, amended November 13, 1942, 7 Fed. Reg. 9441. Meanwhile, on January 12, 1942, the President had issued Executive Order No. 9017 (7 Fed. Reg. 237), establishing, in the Office for Emergency Management, a National War Labor Board for the adjustment and settlement of "labor disputes which might interrupt work which contributes to the effective prosecution of the war" (R. 16).

After the enactment of the Stabilization Act of 1942 (Act of October 2, 1942, 56 Stat. 765, 50 U. S. C. App., Supp. V, 961–971), the President (on October 3, 1942) issued Executive Order No. 9250 "Providing for the Stabilizing of the National Economy," and establishing the Office of Economic Stabilization (7 Fed. Reg. 7871, amended by 8 Fed. Reg. 13083, following 50 U. S. C. App., Supp. V, 901). Title II of the Order establishes the wartime national wage and salary stabilization policy. Title III constituted the National War Labor Board as the agency of the Federal Government authorized to carry out the wage policies stated in the Order and the policy directives to be issued by the Economic Stabilization Director. Section 3 of Title III required the War Labor Board to permit the Wage Adjustment Board for the Building Construction Industry to continue to perform its functions "except insofar as any of them is inconsistent with the terms of this Order." Accordingly, at the

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request of the War Labor Board, the Secretary of Labor amended her Administrative Order No. 101, *supra*, on October 13, 1943, to empower the Wage Adjustment Board to carry out any duties and functions delegated to it by the National War Labor Board. 8 Fed. Reg. 14039. On the same day, the Labor Board issued its General Order No. 13, (a) confirming the functions the Wage Adjustment Board had been performing since its inception, and (b) delegating jurisdiction to the Wage Adjustment Board over all labor disputes, voluntary wage or salary adjustments, and wage revision cases in the building construction industry (both private and public) of which the War Labor Board now had cognizance. Major stabilization principles to be followed by the Wage Adjustment Board were set forth, and with particular regard to revision of wages subject to the Wage Stabilization Agreement of May 22, 1942, it was specifically provided that the "Wage Adjustment Board shall be subject both to the provisions of the Wage Stabilization Agreement of May 22, 1942, and to the requirements of the national wage stabilization program * * *" (cf. R. 16).

Pursuant to the foregoing orders and authority, the instant controversy was referred by the National War Labor Board to the Wage Adjustment Board. A hearing was held on November 28, 1944, before a Hearing Officer, and representatives of respondent and the local union appeared

to urge their opposing views. The Hearing Officer recommended to the Wage Adjustment Board that it direct respondent to pay most of its carpenters a wage rate of $1.425 per hour, retroactive to the beginning of the job (R. 18). Respondent filed with the Board written comments urging that this recommendation be rejected (R. 18–19). However, on January 10, 1945, the Wage Adjustment Board issued a directive order, "pursuant to the Secretary of Labor's Administrative Order No. 101, as amended * * * and in conformity with the National War Labor Board's General Order 13 on wage stabilization in building," (a) defining almost all of the carpenter work on respondent's project as "waterfront work," and (b) directing that all of respondent's carpenters doing "the above defined waterfront work" be paid "at the straight time wage rate of $1.425 per hour retroactive to the beginning of the project" (R. 19–20). This wage increase was at no time ordered by the contracting officer or other War Department representatives, nor did the contracting officer make any recommendations to the Wage Adjustment Board or the Labor Department regarding the claimed increase in wages. The contracting officer's participation was limited to his grant of consent to submission of the dispute to the War Labor Board, and the attendance of the Corps of Engineers' local project manager at the hearing (R. 18, 21).

Shortly after the Wage Adjustment Board's directive order, respondent wrote to the contracting officer advising him of the order's terms, and requesting compensation "for extra payments made by us to such carpenters pursuant to such order" (R. 20). The contracting officer replied that "the action of the Wage Adjustment Board is no basis for an adjustment in the price of subject contract" (R. 20). Respondent appealed this decision to the War Department Board of Contract Appeals, to whom the Secretary of War had delegated his authority under Article 15 of the contract. After a hearing, that Board dismissed the appeal on the ground that it was without jurisdiction, under Article 15, since the Wage Adjustment Board's decision was made by the Government acting in its sovereign capacity rather than its contractual character (R. 6–10, 20–21).

Respondent complied with the terms of the Wage Adjustment Board's directive order without instituting court proceedings. The Court of Claims found that respondent's costs were increased $11,222.91 by fulfilling the order's terms with respect to carpenters to whom the order applied, and that the United States should bear the extra cost (R. 21–22). Judgment was entered in that amount[3] (R. 36).

[3] The Court refused to grant judgment for (a) extra wage payments to carpenters not covered by the Wage Adjustment Board, but to whom respondent granted a like increase in order to keep them on the job (R. 21), and (b) claimed additional supervision and overhead costs (R. 22).

SPECIFICATION OF ERRORS TO BE URGED

The Court of Claims erred:

1. In holding that the United States is liable for increased labor costs resulting from respondent's compliance with the Wage Adjustment Board's directive order raising wages over those stated in the specifications.

2. In holding that the directive order of the Wage Adjustment Board was not a public and general act of the United States as a sovereign, but a contractual act for which the United States is liable to respondent.

3. In holding that by the issuance of the Wage Adjustment Board's directive, without making a corresponding upward revision in the amount due respondent, the United States violated an implied condition of the contract not to increase respondent's cost of performance.

4. In holding that the contract and specifications bound the United States to make compensation to respondent for increased wages paid as a result of compliance with the Wage Adjustment Board's directive.

5. In entering judgment for respondent.

REASONS FOR GRANTING THE WRIT

The Court of Claims has thrust upon the United States the cost of an increase in wages paid under a fixed-price Government construction contract because of a directive order issued by the Wage Adjustment Board (as an agency of

the War Labor Board) establishing a higher wage rate than that anticipated at the execution of the contract. The court reached this result because it viewed the order of the War Labor Board's delegate as a contractual, non-sovereign, interference with the respondent's performance, for which the United States should be held liable. This decision burdens the Government with charges it did not assume, and takes a long step toward abrogation of the settled rule that the United States as contractor cannot be saddled with the results of its action as governing sovereign. *Horowitz* v. *United States,* 267 U. S. 458.

1. a. The War Labor Board system functioned in this case, as in thousands of its other cases, as a wartime arbitral substitute for the normal weapons of industrial strife. The Board was created and endowed with broad jurisdiction over wage and other labor disputes both because "the national interest [in a state of war] demands that there shall be no interruption of any work which contributes to the effective prosecution of the war" (Executive Order No. 9017, "Establishment of the National War Labor Board," 7 Fed. Reg. 237), and also "in order to control so far as possible the inflationary tendencies and the cost dislocation attendant thereon which threatens our military effort and our domestic economic structure" (Executive Order No. 9250, "Providing for the Stabilizing of the National Economy," 7 Fed. Reg. 7871). The important general policies an-

nounced by these two Executive Orders were largely implemented by the decision of individual disputes and the case-by-case adjustment of specific problems. In this case, the policy of Executive Order No. 9017 was fulfilled by the submission of the controversy between respondent and the carpenters' union for arbitration, without any work stoppage, and the Wage Adjustment Board's directive presumably accorded with the detailed stabilization policy established by Executive Order No. 9250 and General Order No. 13, *supra,* pp. 7–8, 9. Certainly the entire process of submission, hearing, and decision—far from being unique to this contract—was governed by the general national program for the peaceful settlement of all labor disputes without inflationary disturbance of the domestic economy. But because the Wage Adjustment Board's adjudication was "a specific order issued on a particular job" (R. 31), the court below refused to recognize it as one of those "public and general acts as a sovereign" for which the United States has long been held immune from liability, even though the cost of performance of a particular government contract has been directly increased. *Horowitz* v. *United States,* 267 U. S. 458, 461; *Deming* v. *United States,* 1 C. Cls. 190, 191; *Jones* v. *United States,* 1 C. Cls. 383, 384; *Wilson* v. *United States,* 11 C. Cls. 513, 520. *Gothwaite* v. *United States,* 102 C. Cls. 400; *Standard Accident Ins. Co.* v. *United States,* 103 C. Cls. 607, 612, certiorari

denied, 326 U. S. 729; *J. F. Barbour & Sons* v. *United States,* 104 C. Cls. 360; *Hallman* v. *United States,* 107 C. Cls. 555; *Clemmer Constr. Co.* v. *United States,* 108 C. Cls. 718, 721–722. This narrowing of the *Horowitz* principle to reach only a "broad policy decision" of general application (R. 32), and to exclude all specific administrative applications of the broad general policy, contravenes both the history and the *rationale* of the principle. The Court of Claims has itself refused to reimburse a contractor for increased expense due to such limited governmental action as the withdrawal of troops from a specified western area (*Jones* v. *United States, supra*), an embargo on the transportation of mules into a disputed military zone (*Wilson* v. *United States, supra*), delays in securing necessary priority orders from the War Production Board (*Gothwaite* v. *United States, supra; J. F. Barbour & Sons* v. *United States, supra*), and the enforcement of a traffic regulation at an army post (*Hallman* v. *United States, supra*). From the founding of the Court of Claims, the test of the Government's immunity has been, not the breadth or sweep of the act complained of, but whether it is a public and general sovereign act which would not subject a private person to suit by his private contractor. Under that test, which follows from the "double character of the Government" (*Wilson* v. *United States, supra,* at 521; cf. *Horowitz* v. *United States, supra,* at 461), decisions of the War Labor

Board, like rulings of the War Production Board and the Office of Price Administration, cannot impose liability on the United States, when sued as a contractor, for impediments or difficulties in the other party's performance. If respondent had been executing a similar private construction contract, a like wage increase directed by the Wage Adjustment Board would not have grounded suit for increased compensation. The United States "can be held to no greater liability than other contractors in other courts." *Deming* v. *United States, supra,* at 191.

b. Respondent's contract does not embody any contractual waiver by the United States of this traditional immunity, nor any agreement to pay the costs of a War Labor Board wage increase. The contract is a fixed-price one; it contains no explicit provision casting the risk of wage changes on the Government; and there is nothing from which to imply such an undertaking. Article 17 provides for payment of "wage rates not less or more than those stated in the specifications (subject to Executive Order Number 9250 and the General Orders and Regulations issued thereunder)" (R. 13–14); and section 1–21 of the specifications sets the carpenters' hourly rate at $1.25 and requires that "the wages specified in the schedule shall be the maximum wages to be paid, subject, however to Executive Order No. 9250 and the General Orders and Regulations issued thereunder" (R. 15). These refer-

ences to the maximum and minimum wages being "subject" to Executive Order No. 9250 were obviously inserted to permit the respondent to pay other wages, should those be ordered or recommended by the War Labor Board, without violating its contractual duty. The United States no more agrees to reimburse respondent for increased costs resulting from a decision under the Executive Order than it reserves the right to demand a refund should the application of the national stabilization policy lead to a wage decrease. That this was also respondent's view, prior to the issuance of the Wage Adjustment Board's directive, plainly appears from its careful investigation of the labor situation before submission of its bid, and its vigorous prosecution of the dispute with its carpenters; if the contract had committed the Government to bearing the increased cost, respondent would have no financial stake in maintaining the $1.25 rate, and the Government, which took only an observer's part in the Board proceedings, would have been the real party in interest.[4] The War Department

[4] That respondent did not then hold the Government liable for the wage increase also appears from its failure, so as the record reveals, to indicate to the Board its intention to apply for extra compensation from the Government. General Order No. 13 (8 Fed. Reg. 14039, 14040, *infra*, pp. 28–30) provided that "any wage or salary adjustment approved or ordered by the Wage Adjustment Board * * * which may increase the costs to the government of a product or service being furnished under a procurement contract, shall become effective only if also approved by the Director of Economic Stabilization." No such approval was sought or secured in this case.

Board of Contract Appeals also held that the contract does not provide for reimbursement of increased labor costs (R. 8–9). However, with the contract's bare reference to Executive Order No. 9250 (*supra*, pp. 2–3, 15), the court below fashions such an implied contractual obligation out of the same basic error which leads it to characterize the Wage Adjustment Board's decision as a purely non-sovereign intervention, *i. e.* recompense is justly due respondent from the Government since it was the Government's action in ordering the raising of the carpenters' wages over those anticipated by respondent which caused the increase in the contract's performance cost. But as we have shown (*supra*, pp. 13–15), it is far too late to hold the United States directly responsible for increases in a contractor's costs resulting from sovereign, non-contractual, governmental action, and it is equally erroneous to imply, without any foundation in the agreement's wording, an actual undertaking by the United States to bear such increased costs.

2. The case is important because the Court of Claims has announced a severe qualification of the settled rule of *Horowitz* v. *United States*, 267 U. S. 458, which will probably subject the United States to substantial added liability, if it continues to be applied in Tucker Act cases. The instant decision is also illustrative of the progressive tendency of the court below to cast upon the United States the risk of wage increases

attributable to the action of governmental boards or departments, unless the contract makes entirely explicit the Government's freedom from liability. See *B–W Construction Co.* v. *United States,* 101 C. Cls. 748, reversed *sub. nom. United States* v. *Beuttas,* 324 U. S. 768; *York Engineering Co.* v. *United States,* 103 C. Cls. 613, certiorari denied, 327 U. S. 784; *Albert & Harrison, Inc.* v. *United States,* 107 C. Cls. 292, certiorari denied, 331 U. S. 810; *Paretta Contr. Co.* v. *United States,* No. 46395, decided October 6, 1947, certiorari denied, February 9, 1948, No. 482, this Term;[6] *C. B. Ross Company, Inc.* v. *United States,* No. 46204, decided December 1, 1947, motion for new trial denied March 1, 1947; cf. *Le Veque* v. *United States,* 96 C. Cls. 250, 253–254; *Clemmer Constr. Co.* v. *United States,* 108 C. Cls. 718. There is need for an authoritative reaffirmation of the substance, as well as the words, of the fundamental principle that in the Court of Claims "the United States appear simply as contractors; and they are to be held liable only within the same limits that any other defendant would be in any other court. Though their sovereign acts performed for the general good may work injury to some private

[6] In the *York Engineering* case, the Government's petition was conditioned upon the granting of the contractor's petition, which was denied; in *Albert & Harrison*, the question pertinent to the instant case was not presented as a ground for certiorari; in *Paretta*, the petition was filed by the contractor.

contractors, such parties gain nothing by having the United States as their defendants." *Jones* v. *United States*, 1 C. Cls. 383, 384–385, approved in *Horowitz* v. *United States*, 267 U. S. 458, 461.

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition should be granted.

PHILIP B. PERLMAN,
Solicitor General.

APRIL, 1948.

APPENDIX A

1. Article 17 of the contract provides as follows:

> *Rate of wages.*—(In accordance with the act of August 30, 1935, 49 Stat. 1011, as amended by the act of June 15, 1940, 54 Stat. 399 (U. S. Code, title 40, secs. 276a and 276a–1), this article shall apply if the contract is in excess of $2,000 in amount and is for the construction, alteration, and/or repair, including painting, and decorating, of a public building or public work within the geographical limits of the States of the Union, the Territory of Alaska, the Territory of Hawaii, or the District of Columbia.)
>
> (a) The contractor or his subcontractor shall pay all mechanics and laborers employed directly upon the site of the work, unconditionally and not less often than once a week, and without subsequent deduction or rebate on any account, the full amounts accrued at time of payment, computed at wage rates not less or more than those stated in the specifications (subject to Executive Order Number 9250 and the General Orders and Regulations issued thereunder) regardless of any contractual relationship which may be alleged to exist between the contractor or subcontractor and such laborers and mechanics; and the scale of wages to be paid shall be posted by the contractor in a prominent and easily accessible place at the site of the work.

The contracting officer shall have the right to withhold from the contractor so much of accrued payments as may be considered necessary by the contracting officer to pay to laborers and mechanics employed by the contractor or any subcontractor on the work the difference between the rates of wages required by the contract to be paid laborers and mechanics on the work and the rates of wages received by such laborers and mechanics and not refunded to the contractor, subcontractors, or their agents.

(b) In the event it is found by the contracting officer that any laborer or mechanic employed by the contractor or any subcontractor directly on the site of the work covered by the contract has been or is being paid a rate of wages less than the rate of wages required by the contract to be paid as aforesaid, the Government may, by written notice to the contractor, terminate his right to proceed with the work or such part of the work as to which there has been a failure to pay said required wages and prosecute the work to completion by contract or otherwise, and the contractor and his sureties shall be liable to the Government for any excess costs occasioned the Government thereby.

2. Section 1–21 of the specifications provides in pertinent part:

1–21. *Rates of Wages.*—(a) The minimum wages to be paid laborers and mechanics on this project, as determined by the Secretary of Labor to be prevailing for the corresponding classes of laborers and mechanics employed on projects of a character similar to the contract work in the pertinent locality, are as follows:

Predetermination of the Secretary of Labor as modified 11 March 1944

Classification of Laborers and Mechanics	Minimum rates of wages per hour
Carpenters, journeymen	$1.25

(b) Any class of laborers and mechanics not listed in the preceding paragraph, which will be employed on this contract, shall be classified or reclassified conformably to the foregoing schedule by mutual agreement between the Contractor and class of labor concerned subject to the prior approval of the Division Engineer, G. L. D., Chicago, Illinois. In the event the interested parties cannot agree on the proper classification or reclassification of a particular class of laborers and mechanics to be used, the question, accompanied by the recommendation of the Division Engineer, shall be referred to the Secretary of Labor for final determination. The wages specified in the schedule shall be the maximum wages to be paid, subject, however, to Executive Order No. 9250 and the General Orders and Regulations issued thereunder. Requests for the establishment of such additional classification shall be submitted through the District Engineer. * * *

APPENDIX B

1. Executive Order No. 9250, October 3, 1942, as amended (7 Fed. Reg. 7871, as amended, 8 Fed. Reg. 13083) provides in part as follows:

Providing for the Stabilizing of the National Economy

By virtue of the authority vested in me by the Constitution and the Statutes, and particularly by the Act of October 2, 1942, entitled "An Act to Amend the Emergency Price Control Act of 1942, to Aid in Preventing Inflation, and for Other Purposes" as amended by the Public Debt Act of 1943 (Public Law 34—78th Congress), as President of the United States and Commander in Chief of the Army and Navy, and in order to control so far as possible the inflationary tendencies and the vast dislocations attendant thereon which threaten our military effort and our domestic economic structure, and for the more effective prosecution of the war, it is hereby ordered as follows:

TITLE I—ESTABLISHMENT OF AN OFFICE OF ECONOMIC STABILIZATION

1. There is established in the Office for Emergency Management of the Executive Office of the President an Office of Economic Stabilization at the head of which shall be an Economic Stabilization Director (hereinafter referred to as the Director).

* * * * *

TITLE II—WAGE AND SALARY STABILIZATION POLICY

1. No increases in wage rates, granted as a result of voluntary agreement, collective bargaining, conciliation, arbitration, or otherwise, and no decreases in wage rates, shall be authorized unless notice of such increases or decreases shall have been filed with the National War Labor Board, and unless the National War Labor Board has approved such increases or decreases.

2. The National War Labor Board shall not approve any increase in the wage rates prevailing on September 15, 1942, unless such increase is necessary to correct maladjustments or inequalities, to eliminate substandards of living, to correct gross inequities, or to aid in the effective prosecution of the war.

Provided, however, that where the National War Labor Board or the Price Administrator shall have reason to believe that a proposed wage increase will require a change in the price ceiling of the commodity or service involved, such proposed increase, if approved by the National War Labor Board, shall become effective only if also approved by the Director.

3. The National War Labor Board shall not approve a decrease in the wages for any particular work below the highest wages paid therefor between January 1, 1942 and September 15, 1942, unless to correct gross inequities and to aid in the effective prosecution of the war.

* * * * *

TITLE III—ADMINISTRATION OF WAGE AND SALARY POLICY

1. Except as modified by this Order, the National War Labor Board shall continue

to perform the powers, functions, and duties conferred upon it by Executive Order No. 9017, and the functions of said Board are hereby extended to cover all industries and all employees. The National War Labor Board shall continue to follow the procedures specified in said Executive Order.

2. The National War Labor Board shall constitute the agency of the Federal Government authorized to carry out the wage policies stated in this Order, or the directives on policy issued by the Director under this Order. The National War Labor Board is further authorized to issue such rules and regulations as may be necessary for the speedy determination of the propriety of any wage increases or decreases in accordance with this Order, and to avail itself of the services and facilities of such State and Federal departments and agencies as, in the discretion of the National War Labor Board, may be of assistance to the Board.

3. No provision with respect to wages contained in any labor agreement between employers and employees (including the Shipbuilding Stabilization Agreements as amended on May 16, 1942, and the Wage Stabilization Agreement of the Building Construction Industry arrived at May 22, 1942) which is inconsistent with the policy herein enunciated or hereafter formulated by the Director shall be enforced except with the approval of the National War Labor Board within the provisions of this Order. The National War Labor Board shall permit the Shipbuilding Stabilization Committee and the Wage Adjustment Board for the Building Construction Industry, both of which are provided for in

the foregoing agreements, to continue to perform their functions therein set forth, except insofar as any of them is inconsistent with the terms of this Order.

4. In order to effectuate the purposes and provisions of this Order and the Act of October 2, 1942, any wage or salary payment made in contravention thereof shall be disregarded by the Executive Departments and other governmental agencies in determining the costs or expenses of any employer for the purpose of any law or regulation, including the Emergency Price Control Act of 1942, or any maximum price regulation thereof, or for the purpose of calculating deductions under the Revenue Laws of the United States or for the purpose of determining costs or expenses under any contract made by or on behalf of the Government of the United States.

* * * * *

2. General Order No. 13 of the National War Labor Board (8 Fed. Reg. 14039) provides in part:

§ 803.13 *General Order 13.* (a) Title III, Section 3 of Executive Order No. 9250 of October 3, 1942, (8 F. R. 7871) provides: "The National War Labor Board shall permit * * * the Wage Adjustment Board for the Building Construction Industry * * * to continue to perform its functions * * * except insofar as any of them is inconsistent with the terms of this order." Pursuant thereto, the Wage Adjustment Board, constituted as hereinafter described, shall continue to perform the duty ascribed to it by Administrative Order No. 101, as amended, of the Secretary of Labor, and by the Wage Stabilization Agreement of May 22, 1942,

between the Building and Construction Trades Department of the American Federation of Labor and Several Government Agencies, all in accordance with the further provisions of this order.

(b) The Wage Adjustment Board for the Building Construction Industry shall consist of nine members, of whom three shall represent labor, three shall represent industry, and three, including the chairman, shall represent the public.

(c) Applications for approval of revision of rates subject to the Wage Stabilization Agreement of May 22, 1942, which revision would otherwise require the approval of the National War Labor Board, shall be submitted for approval to the Wage Adjustment Board. In acting upon such applications, the Wage Adjustment Board shall be subject both to the provisions of the Wage Stabilization Agreement of May 22, 1942, and to the requirements of the national wage stabilization program, as set forth in paragraph (f) hereof.

(d) The Wage Adjustment Board for the Building Construction Industry shall, in addition to the powers set forth in paragraphs (a) and (c) hereof, have jurisdiction over labor disputes and voluntary wage or salary adjustments involving persons employed in the building construction industry (as hereinafter defined) who are not subject to the Wage Stabilization Agreement of May 22, 1942. The Wage Adjustment Board shall have power, subject to review by the National War Labor Board as provided in paragraph (k) hereof, (1) to hear, and issue directive orders, in labor dispute cases, and (2) to make final rulings on voluntary wage and salary adjustments

requiring the approval of the National War Labor Board.

(e) The jurisdiction of the Wage Adjustment Board hereunder shall, as heretofore, be limited to mechanics and laborers in the building and construction industry employed directly upon the site of the work.

(f) In the performance of its duties hereunder, the Wage Adjustment Board, in addition to all pertinent policies of the National War Labor Board and the Director of Economic Stabilization, heretofore or hereafter announced, shall conform to the following principles and to any modification thereof hereafter promulgated by the National War Labor Board:

* * * * *

(h) In accordance with the requirements of Executive Orders No. 9250 and 9328 and the Supplement thereto of May 12, 1943, issued by the Director of Economic Stabilization, any wage or salary adjustment approved or order by the Wage Adjustment Board "which may furnish the basis either to increase price ceilings or to resist otherwise justifiable reductions in price ceilings," or, if no price ceilings are involved, which may increase the costs to the government of a product or service being furnished under a procurement contract, shall become effective only if also approved by the Director of Economic Stabilization. Notice to this effect shall be contained in all rulings and orders requiring this approval which are issued by the Wage Adjustment Board.

* * * * *

(j) (1) All applications for the voluntary adjustment or revision of wage rates shall contain, or the Wage Adjustment

Board shall, before acting on the application, procure, a statement by the employer as to whether the adjustment or revision if approved (i) may furnish the basis to increase price ceilings or (ii) may furnish the basis for an application by the employer for an increase to the government in the price of any product or service. If the statement is in the affirmative as to (i), the Wage Adjustment Board shall send to the Office of Price Administration a copy of the application and a copy of its ruling at the time of issuance thereof. If the statement is in the affirmative as to (ii) and an adjustment of the type that requires the approval of the Economic Stabilization Director is approved by the Wage Adjustment Board, the Wage Adjustment Board shall send to the appropriate procurement agency of the government a copy of its ruling at the time of issuance thereof.

(2) In any wage dispute case where it appears that the wage adjustment recommended or ordered may furnish the basis to increase price ceilings, the Wage Adjustment Board shall send to the Office of Price Administration a copy of the recommendation of its panel or hearing officer at the time of its transmittal to the parties and of its directive order when issued. In any wage dispute case where it appears that the wage adjustment ordered may furnish the basis for an application by the employer for an increase to the government in the price of any product or service and the adjustment is of the type that requires the approval of the Economic Stabilization Director, the Wage Adjustment Board shall send to the appropriate procurement agency of the government a copy of its directive order when issued.

(3) In all cases where the approval of the Director of Economic Stabilization is required, the Wage Adjustment Board shall, after its ruling or order is issued, send the case to the National War Labor Board for transmittal to the Director of Economic Stabilization. The Wage Adjustment Board shall, upon being notified, advise the parties of the action taken by the Office of Price Administration or by the Director of Economic Stabilization.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

No. 713

THE UNITED STATES, PETITIONER

v.

THE SUNSWICK CORPORATION, A CORPORATION OF DELAWARE

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the Court of Claims, entered in the above-entitled case on January 5, 1948. This brief in opposition thereto is presented on behalf of the Sunswick Corporation.

Opinion Below

The opinion of the Court of Claims (R. 22-36) has not yet been reported.

Jurisdiction

The judgment of the Court of Claims was entered on January 5, 1948 (R. 36). The jurisdiction of this Court has been invoked under the provisions of Section 3 (b) of the Act of February 13, 1925, as amended.

Question Presented

Whether a specific directive issued by an agency of the National War Labor Board under Executive Order No. 9250 increasing the wage rate for carpenters specified in respondent's construction contract with the Government and correcting as of the date of the contract an erroneous wage rate represented by the Government in said construction contract to be prevailing for carpenters in the area of the work, constituted an interference with respondent's performance and the correction of a mistake of the Government for which the United States should be held liable.

Statement

This is a claim for extra labor costs incurred by the respondent under a lump sum construction contract with the United States. These costs resulted from an increase in the wage rate of carpenters working on a War Department canal improvement project at Sault Ste. Marie, Michigan in 1944 and 1945. In September 1944 the respondent was the successful bidder on a project of the Corps of Engineers, U. S. War Department involving the deepening of the canal, rebuilding one of the walls, and installing additional protective gates at Sault Ste. Marie, Michigan (R. 12-13). The contract specifications (R. 14-15) prepared by the Corps of Engineers for this work provided maximum wage rates to be paid on this project to the various crafts employed. The maximum wage specified to be paid to journeymen carpenters was $1.25 per hour as predetermined by the Secretary of Labor and adopted by the War Department. The respondent relied upon this maximum wage rate in preparing its competitive bid and in entering into Contract No. W-20-064-Eng.-1231 with the Government on September 21, 1944 (R. 14).

When the project got under way the respondent hired its full crew of carpenters at $1.25 per hour. After two weeks

of work at that rate the Carpenters' Union demanded an increase to $1.425 per hour. The respondent resisted the demand of the Carpenters' Union for a wage in excess of that fixed in its contract with the Government (R. 17) and the dispute went finally to the Wage Adjustment Board of the United States Department of Labor. On January 10, 1945 the said Board ordered the respondent to grant an increase from $1.25 to $1.425 to about 98% of its carpenters, *i. e.*, all carpenters doing waterfront work. The respondent obeyed (R. 24).

The respondent requested the contracting officer to rule that the respondent would be compensated for the increased labor costs in view of the contract specification which fixed $1.25 per hour as the maximum to be paid to carpenters (R. 24). Article 3 of the Contract gave the contracting officer power to make equitable adjustments in the contract price whenever changes in the specifications caused an increase in the contractor's costs (R. 13). The contracting officer denied any contract adjustment to the respondent. Thereafter the respondent appealed to the Secretary of War acting through the Board of Contract Appeals. The Board in its opinion stated that there seemed to be no question about the effect of the Wage Adjustment Board's ruling on respondent, that is, it increased respondent's expenditures over and above the amount contemplated when respondent prepared its bid. The Board ruled that it could not take jurisdiction since the question was one of impairment of the obligation of the contract (R. 24, 25).

The petitioner on page 10 of its Statement has made a gross misstatement. It is there stated that the Board of Contract Appeals dismissed respondent's appeal on the ground that the Wage Adjustment Board's decision was made by the Government acting in its sovereign capacity rather than its contractual character. On the contrary, the sole ground on which the Board of Contract Appeals dismissed respondent's appeal was that the Board did not

have jurisdiction to determine the issues involved and that its function must be limited to the finding of a factual background which may or may not afford the contractor relief depending upon the results of some procedure before another tribunal (R. 9, 21).

The Court of Claims found that respondent's costs were increased $11,222.91 by fulfilling the terms of the order with respect to the wages of carpenters to whom the order applied and that the United States should bear the extra cost (R. 21-22). Judgment was entered in that amount (R. 36).

The grounds on which the foregoing judgment is based are that the contract places upon the contractor the risk of wage increases except those caused by the United States, that the United States in its contractual capacity here compelled the contractor to raise carpenters' wages above the level anticipated in the bid and the contract documents and that the contracting officer was duty-bound to invoke his powers under Article 3 of the contract to afford the contractor relief (R. 35). Furthermore, the specifications contained a misrepresentation (relied on by the contractor in its bid) as to the prevailing rate for carpenters in the area of this work and the contractor was injured when the United States corrected its misrepresentation by determining that a higher wage rate actually prevailed in this area at all times involved herein (R. 36).

ARGUMENT

POINT ONE

Where a contracting agency fixes a maximum wage rate in a construction contract and another Governmental agency compels a higher rate to be paid, the contractor is entitled to receive its increased costs.

POINT TWO

The determination of a higher prevailing wage rate was not a sovereign act but was rather the correction of a mistake in the specifications.

POINT THREE

The risk of increase in carpenters' wages where such increase is ordered by the United States, was not a risk assumed by the contractor.

POINT ONE

Where a contracting agency fixes a maximum wage rate in a construction contract and another Governmental agency compels a higher rate to be paid, the contractor is entitled to receive its increased costs.

A recent case directly in point is that of *York Engineering Co.* v. *United States*, 103 C. Cls. 613, cert. denied 327 U. S. 784. The plaintiff contracted with the United States to build a lock and dam in the Allegheny River. The contract specifications provided for minimum wage rates which were subject to change by the contracting officer and when so changed the contract price was to be adjusted accordingly.

The government acting through the WPA increased minimum wages on nearby jobs from 35 to 50 cents and to retain its labor force the plaintiff had to increase minimum wages to 60 cents. The contracting officer refused to approve any increase in contract price. The plaintiff protested but its claim was denied completely in the War Department. It was held that if the wage increase had been directed by the Government the contract price would have, by the terms of the contract, been increased to cover it. It was the United States however who caused the plaintiff to raise its wages since the W. P. A. (a governmental agency) raised wages in the vicinity. While the contract stated that the contract price would be adjusted if the *contracting officer* ordered an increase in wages the Court held that the contractor could recover its extra labor costs if another agency of the Government caused the wage increase regardless of whether or not the contracting officer recognized the contractor's claim. In that connection the Court, in giving judgment to the plaintiff, said:

> "We think it was fairly implied in the contract that if the Government should do something which made it impracticable for the contractor to obtain labor at the minimum wage set in the contract, *the power to* increase that minimum, and *compensate the contractor for the increase would be used.*" (Italics ours.)

In the course of its opinion in the *York Engineering* case the Court of Claims cited its own ruling in the *Beuttas* case (discussed below). Thereafter the Supreme Court reversed the *Beuttas* case and before judgment was entered in the *York Engineering* case the Government moved (June 4, 1945) for a rehearing specifically calling the Court's attention to the reversal of the *Beuttas* case. The Court of Claims denied this motion and entered judgment for the plaintiff, York Engineering Co. for its increased wage expenditures. This Court obviously determined thereby that its ruling in this case is not con-

trolled by the *Beuttas* case for the reason that in the *Beuttas* case the Government did not directly increase wages but in the *York* case (as in our own case) the Government did directly and knowingly cause the wage raise.

Actually our case is far stronger than the *York* case. In our situation the Government stepped directly into our labor dispute and provided Governmental conciliation efforts, which failed. Later an agency of the Government ordered an increase in carpenters' wages thereby increasing our labor costs in a manner not contemplated when the contract was bid and awarded. In fact it is apparent that by making the increased wage rate ($1.425 per hour) effective as of the beginning of our project, the Wage Adjustment Board actually determined that the War Department had placed the wrong rate ($1.25 per hour) in the contract specifications. As in the *York* case, our contract (Article 3) (R. 13) provided that the contracting officer had the power to make an equitable adjustment of the contract price in such instances as this. The *York* case is strong authority for the proposition that where a contracting agency fixes a maximum wage rate in a construction contract, and another governmental agency compels a higher rate to be paid, the Government acting through its contracting officer should exercise such powers as it has reserved in the contract to make an equitable adjustment in favor of the contractor.

The most recent case in the Supreme Court on questions such as this is the case of *United States* v. *Beuttas,* 324 U. S. 768. While a recovery for extra wages paid in that case was reversed by the Supreme Court, the entire proceeding clearly indicates that respondent in this case is entitled to recover the extra wages paid pursuant to the order in question.

In that case Beuttas contracted to build foundations for a Government public housing project. The contract pro-

vided for certain minimum wage rates to be paid by the contractor and that if the Government should increase wages then the contract price should be adjusted accordingly. The contract further provided that the Government would not consider any claims for additional compensation made by the contractor because of payment by the Contractor of any wage rate in excess of the applicable wage rate contained therein.

Before the foundation work was completed the Government advertised for bids on the superstructure work specifying higher rates of pay than were contained in the Beuttas contract. The foundation workers struck and demanded the higher rates of pay. Beuttas had to grant their demands. The Court of Claims awarded Beuttas its increased labor costs. In said court the case was known as *B-W Construction Co.* v. *United States* 101 C. Cls. 748. The Supreme Court reversed that ruling on the ground that the Government had not caused Beuttas to pay the increased wage rates, so therefore the contract clause providing for an adjustment of the contract price could not be invoked. The Court then discussed the point that the Government had breached the covenant implied in every contract that one party may not culpably increase the other party's cost of performance. The Court held that such a breach of implied covenant would have occurred if the Government had actually caused the increase in wage rates. The award of increased costs was set aside because the Government planned that the superstructure work should be done after the foundation work was finished and that the two contracts should not run concurrently.

No agency of the United States Government had directly ordered Beuttas to increase wages nor had any such agency *knowingly* hindered the contractor in the performance of its work and for these reasons the court held that the payment of extra wages was not caused by the United States.

The following language of the Supreme Court at page 772 is most significant:

> "They (the Court of Claims) held that by inviting bids for the superstructure at minimum wages higher than those fixed in respondent's contract for the foundations the petitioner breached the implied condition (that neither party will hinder the other in his discharge of the obligation imposed on him nor increase his cost of performance) but of course this can only be true if the Government caused the increase in wages."

From this language the implication is clear that had the Government caused the increase in wages the contractor would have recovered. In our case the United States acting through the Department of Labor, not by indirection but by a specific Directive Order, increased carpenters' wages on our project. Furthermore in the *Beuttas* case the Supreme Court points out that the Government took no part in the dispute between the contractor and its workmen. In our case on the other hand the Government took a strong hand in the settlement of the dispute. The Government on May 22, 1942 made an agreement with the Building and Construction Trades Department, A. F. L.; after the dispute arose the Government's Conciliation Commissioner attempted to settle it; a hearing officer visited the area to conduct a hearing attended by the contracting officer (R. 24) on behalf of the Wage Adjustment Board, U. S. Department of Labor; and on January 10, 1945 the Wage Adjustment Board dictated that an increase be made effective retroactively to the inception of the contract work (R. 23-24).

The general principle of law on which Point One, now under discussion, is based has been well established in this Court and elsewhere. Where an owner (in this case the United States) by its acts or orders makes performance more expensive to the contractor than such performance

would have been under the terms specified in the contract, the contractor is entitled to recover his extra costs occasioned by such acts or orders.

Some of the decisions upholding this principal are:

United States v. *Smith*, 256 U. S. 11;
Collins v. *State of N. Y.*, 259 N. Y. 200.

In 1924 the Virginia Engineering Co. contracted with the United States to put plumbing in a Veterans' Bureau Hospital in Pennsylvania. Other contractors had contracts to erect the building and to do the electrical work. The other contractors were unionized but the claimant was operating an open shop. The local unions demanded that the claimant unionize. It refused and the unions struck the whole job. The claimant's men continued to work regularly.

General Hines, Director of the Veterans' Administration called a meeting in Washington, D. C. and said that the Veterans' Administration needed the hospital badly and that, if the strike wasn't settled soon, the Government would take over the contracts. This amounted to a request by the Government that the contractor accede to the union's demand. The contractor did so. Numerous additional union demands followed and at the Government's urging and requests the contractor acceded to all of them. Its added labor costs were $71,000. It was held that the contractor was entitled to recover. The threat of the Government to take over the contracts was in the nature of duress upon the contractor. *Virginia Engineering Co., Inc.* v. *U. S.*, 89 C. Cls. 457. See also *Dravo Corp.* v. *U. S.*, 93 C. Cls. 734; *Edward E. Gillen Co.* v. *U. S.*, 99 C. Cls. 574; *R. C. Huffman Const. Co.* v. *U. S.*, 100 C. Cls. 80; *John E. Sjostrom Co.* v. *U. S.*, 100 C. Cls. 548.

As recently as March 5, 1945 the Court of Claims reaffirmed this principle in the case of *Hardie-Tynes Mfg. Co.* v. *U. S.*, 103 C. Cls. 274. There the contractor raised

wages on a Government project not as a result of an order of the Government as in our case, but as a result of a gratuitous appeal by the President.

Thus, from widely varied factual situations, it appears settled that where the Government fixes a maximum wage rate in a contract and then causes that rate to be raised, the Government has breached the implied condition of every contract that it will not culpably increase the contractor's costs of performance and in such instances the contractor may recover. We believe we have demonstrated that our case falls squarely within this rule.

POINT TWO

The determination of a higher prevailing wage rate was not a sovereign act but was rather the correction of a mistake.

By the Act of March 3, 1931 as amended by the Act of August 31, 1935 (40 USC Sec. 276(a)) all Government construction contracts must contain a provision stating the minimum wage to be paid various classes of laborers and mechanics based upon the prevailing wage as determined by the Secretary of Labor.

The statute further provides that such wage shall be fixed in accordance with the wage rate prevailing for the corresponding classes of mechanics employed on projects of a similar character in the area where the work is to be performed.

Certainly the petitioner cannot maintain that the fixing of the prevailing wage rate for a given locality pursuant to the above statute is a sovereign act. It is obviously ministerial.

3 *Am. Jur.* Sec. 3, page 830;
City of Omaha v. *Omaha Water Co.*, 218 U. S. 180;

Zimmerman v. *Marymor,* 290 Pa. 299;
Gillioz v. *Webb,* 99 F. (2d) 585.

In the latter case the Circuit Court of Appeals, Fifth Circuit at page 587 said:

> "The function of the Secretary in thus ascertaining and declaring the prevailing rate of wages is not arbitrational or in the nature of a judicial inquiry, and therefore requiring for its validity a formal controversy and hearing. It is that of an appraiser or valuer, a part of the process fixed by contract for determining a price, or an amount to be paid."

Petitioner seeks to invoke the principle involved in *Horowitz* v. *United States,* 267 U. S. 458, and in the early decisions of this court in *Deming* v. *United States,* 1 C. Cls. 190; *Jones* v. *United States,* 1 C. Cls. 383, and in *Wilson* v. *United States,* 11 C. Cls. 513, as well as in its recent decisions in *Gothwaite* v. *United States,* 102 C. Cls. 400; *Standard Accident Insurance Co.* v. *United States,* 103 C. Cls. 607, and *Clemmer Construction Co., Inc.* v. *United States,* 108 C. Cls. 718, that the United States when sued as a contractor cannot be held liable for an obstruction to the performance of the particular contract resulting from its public and general acts as a sovereign.

This principle is inapplicable to the facts of this case. It may be granted, as petitioner contends, that the Government in its sovereign capacity and acting for the public good set up a general program to control inflationary tendencies and minimize work interruptions which might interfere with the effective prosecution of the war, and that Executive Order No. 9250 and General Order 13, which issued thereunder, were promulgated as a part of this program. It still does not follow that the action of the Wage Adjustment Board in directing the respondent to increase its carpenters' wages can be so isolated under the guise

of an act of sovereignty as to permit the Government, in its capacity as a party to the contract, to disavow having had any part in such action, and to disclaim any liability for whatever increased burden this action may have added to the performance of the contract. The increased wage costs resulted not from the Government's public and general act in setting up its wartime system for controlling and adjusting wages, nor from any widespread and general application of a device created for this public purpose as a matter of national policy, but rather from a specific order issued on a particular job by one agency of the Government, to wit, the Wage Adjustment Board, to whom the contracting agency, the War Department, had by a provision of its contract delegated authority to modify the specifications as to wage rates. The distinction between the manner of conduct for which the Government was held not liable in the cases above cited, and the act for which the petitioner has been held responsible in the instant case, is obvious.

The underlying basis for the doctrine of nonliability of the Government for its general and public acts as a sovereign is well expressed in *Jones* v. *United States, supra,* where the court said:

> "In this court the United States appear simply as contractors; and they are to be held liable only within the same limits that any other defendant would be in any other court. Though their sovereign acts performed for the general good may work injury to some private contractors, such parties gain nothing by having the United States as their defendants."

The Government may by the terms of its contract bind itself for the consequences of some act on its behalf which, but for the contract, would be nonactionable as an act of the sovereign. As shown in *Bostwick* v. *United States,* 94 U. S. 53, 69, the liability of the Government in such circumstances rests upon the contract and not upon the act

of the Government in its sovereign capacity. It was there held that while the Government was not answerable for that portion of the destruction of trees and fences and the removal of stone and gravel from the plaintiff's property which occurred during the wartime occupancy of said property by Federal troops prior to a lease of the premises to the Government, it was answerable in the Court of Claims for that destruction and loss which the troops occasioned during the Government's occupancy of the premises under lease, as voluntary waste within the prohibition of the implied agreement in such lease. The court stated (p. 69):

> "If there had been in this lease an express agreement to repair, certainly it could not have been successfully claimed that the Court of Claims would not have had jurisdiction to award damages for a failure to rebuild after the fire, even though the fire was caused by the soldiers while in the hospital for treatment. But the implied obligation as to the manner of the use is as much obligatory upon the United States as it would be if it had been expressed. If there is a failure to comply with the agreement in this particular, it is a breach of the contract, for which the United States consent to be sued in the Court of Claims. All depends upon the contract. Without that, the jurisdiction does not include actions for damages by the army; with it, damages contracted against may be recovered as for a breach of the contract.
>
> It appears in the finding that during the occupancy under the lease ornamental trees were destroyed; fences and walls torn down, and the materials used for sidewalks and the erection of other buildings, or carried away; and that stone was quarried and gravel dug from a stone-quarry and gravel-pit on the premises, and taken away. This was voluntary waste, and within the prohibition of the implied agreement in the lease. For this the Court of Claims can award compensation in this action."

If the War Labor Board, or the Wage Adjustment Board as its agent, had had under consideration and had decided pursuant to Executive Order 9250 a question of national policy concerning wages or wage rates generally or those in a particular industry in connection with the stabilization of the national economy and had decided that for economic reasons to authorize a general wage increase, rather than whether the Government had or had not made a proper classification of carpenters and fixed a proper wage rate therefor, such a broad policy decision applicable to everyone alike would be one which might properly be classified as a sovereign act for which no recovery could be had by a contractor for increased costs occasioned thereby. But on the facts and under a proper interpretation of the contract here involved, the action which the Government took in this case through the decision of the Wage Adjustment Board which changed one of the labor classifications and added a new one and changed the wage rate fixed in the contract, was not a decision of the character abovementioned.

Up to the date of signing this construction contract (September 21, 1944) the Secretary of Labor's predetermination was that the prevailing wage rate for journeymen carpenters for the Sault Ste. Marie area was $1.25 per hour. This wage rate, right or wrong, prevailing or not prevailing at that time and place, was adopted by the War Department, placed in the bidding documents and in the contract specifications. Such wage rate was thus adopted by the War Department as the prevailing wage rate applicable to this project. As stated in the *Gillioz* case (*supra*), the contract made the Secretary's finding conclusive upon the contractor.

The Wage Adjustment Board later ruled that the predetermination of the prevailing wage rate for journeymen carpenters (at $1.25 per hour) for this locality was erroneout not only at the time it was made (presumably March

11, 1944) but was likewise erroneous and misleading at the time it was adopted by the War Department (September 21, 1944) and placed in the contract. On January 1, 1944 the local Carpenter's Union at Sault Ste. Marie entered into an agreement with some local contractors whereby the minimum rate for carpenters when working in or near water was $1.425 per hour (R. 23). The Secretary of Labor apparently knew nothing of this local union agreement fixing the wage rate at $1.425 per hour when she determined on March 1, 1944 that $1.25 was the prevailing rate. The War Department likewise made an honest mistake when, on September 21, 1944, it adopted the Secretary of Labor's "prevailing" rate and incorporated it in the contract with the respondent. The respondent, likewise, knowing nothing of this local union agreement, and learning nothing of it during a visit to the site, relied upon the "prevailing" rate as set forth in the bidding documents and as embodied in the contract and bid accordingly (R. 17). The respondent hired a crew of carpenters at $1.25 per hour and started work on September 21, 1944. On October 6, 1944 the respondent first learned about the local union agreement and of the pre-existing higher local wage rate (R. 17).

This Court is familiar with the course of the respondent's dispute with the union culminating in a finding by the Wage Adjustment Board, as an agency of the Secretary of Labor, that the rate of $1.425 and not $1.25 per hour was the prevailing rate for carpenters in this locality on September 21, 1944 when the contract was signed. The Wage Adjustment Board directed that $1.425 be paid retroactive to the beginning of the project. Work began on this project on September 21, 1944 (R. 17) and that is the same date on which the contract was signed.

In the plaintiff's dispute with the union, the union did not take the position that it was asking for a raise in the carpenters' wage rate. The union consistently maintained

that the rate of $1.425 per hour was the prevailing wage rate in that locality and had been the prevailing rate for 2 years, *i. e.*, since 1942. The Hearing Officer of the Wage Adjustment Board of the Department of Labor found that the prevailing rate in this locality was $1.425 or higher since May 1942 and this report formed the basis of the directive order.

We thus reach the conclusion that here we do not have a finding of a wage increase or an order to increase wages as contemplated under Executive Order 9250 and the General Order and Regulations issued thereunder. We have here, in truth, a finding by an instrumentality of the Secretary of Labor (created by her Administrative Order 101) that the prevailing wage rate for carpenters working at or near the water was $1.425 per hour on September 21, 1944 and not $1.25 per hour, which the contract of that date specified to be the prevailing rate, and a direction to the contractor to pay such higher prevailing wage rate.

Thus no sovereign act is here involved. It is merely an appraisal or a valuation, a determination of a fact (what is the prevailing wage rate in this locality) and the correction of a possible mistaken determination originally made pursuant to powers in existence long before the war and having no relation to the war or to the problem of controlling inflation.

The Secretary of Labor in Administrative Order 101 stated that one of the reasons for creating the Wage Adjustment Board in May 1942 was to accomplish the purpose of the Act of March 3, 1931 as amended and that act, it will be recalled, set forth the authority for the determination and use of the prevailing wage in Government construction contracts. Such is the function that has been performed in our case by the Wage Adjustment Board.

What we do have here is an honest mistake in the predetermination of the $1.25 wage rate and the use of that

mistake and erroneous wage rate in the contract. When that error was corrected by the retroactive finding of the Wage Adjustment Board serious injury was caused to the contractor.

On December 2, 1946 the Court of Claims decided a case which appears to be determinative of our case. *Albert & Harrison, Inc.* v. *United States,* 107 C. Cls. 292, certiorari denied, 331 U. S. 810. There the War Department mistakenly placed the wrong wage rate ($1.50) in a contract instead of the correct rate as determined by the Department of Labor ($1.75). Recovery was had by the plaintiff. In our case the error was initially made not by the War Department but by the Secretary of Labor in determining that $1.25 was the prevailing wage rate for certain carpenters in the Sault Ste. Marie area in 1944. The War Department adopted that mistaken determination and bound the contractor to it, and obtained contractor's bid prices based upon it. Of what signficance is it that the initial mistake was made not in the War Department as in the case cited, but by the Secretary of Labor and adopted and used by the War Department?

POINT THREE

The risk of increase in carpenters' wages was not a risk assumed by the plaintiff.

Contractors are accustomed to assuming risks, they being an essential feature of the construction industry. Contractors include in their bids amounts, which, in their opinion, are sufficient to compensate them for the risks to be encountered.

In the instant case, the bidding and contract documents set forth the minimum and maximum wages to be paid, so the risk of fluctuation in rates of wages was not one assumed by the respondent and it made no provision to meet such risk.

The risk of increased wages having been specifically eliminated from the contract and the United States having received a lower bid because of that fact, and the increase in wages having been specifically ordered by the United States, it cannot now claim that the respondent should not receive the extra wages paid pursuant to such order of the United States.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition herein should be denied.

Respectfully submitted,

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